# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 18, 2014 |
| v | No. 311573<br>Muskegon Circuit Court |
| STEVEN LYNN HENDRICKS,<br><br>Defendant-Appellant. | LC No. 11-060802-FC |

Before: HOEKSTRA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Steven Lynn Hendricks appeals as of right his jury convictions of second-degree murder, MCL 750.371, and felony-firearm, MCL 750.227b. Defendant was sentenced to two years' imprisonment for the felony-firearm conviction and 22-1/2 to 50 years' imprisonment for the second-degree murder conviction. Because we conclude that the trial court did not err by denying defendant's request to admit hearsay statements or by declining to instruct the jury on voluntary manslaughter and because defendant was sentenced in accordance with binding Michigan law, we affirm.

Defendant's convictions arise from the shooting death of Eddie Wilson, Jr. Wilson was shot while sitting in the driver's seat of his black Chevrolet Tahoe in a parking lot when at least eight .380-caliber bullet rounds were fired from an automatic weapon through the back of his vehicle. The shot that caused Wilson's death struck him in his right temple, just above his ear. The prosecution's theory of the case was that defendant and Wilson were not getting along because of a fight between Wilson and other members of defendant's family. Defendant asserted that he was the victim of mistaken identity. Before trial, defendant indicated that he would call Antonio McBride as a defense witness to testify that he was not the shooter. However, at the time of trial, McBride informed defense counsel that he would not testify, and the trial court held him in contempt.

After McBride refused to testify, defendant moved under MRE 804(b)(7) for admission of a police report containing a statement McBride made to officers on February 28, 2012, indicating that "Chip," not defendant, was the shooter. The prosecution objected to admission of the statement primarily on the ground that it could not meet the test for trustworthiness under MRE 804(b)(7). Specifically, the prosecution argued that the statement was made several months after the incident and was contradicted by physical evidence. Further, the statement was

internally inconsistent; therefore, the prosecution requested that the trial court exclude the statement. The trial court agreed with the prosecution, ruling that the statement was inadmissible because it lacked circumstantial guarantees of trustworthiness as required for admission under MRE 804(b)(7).

On appeal, defendant first argues that the trial court erred by refusing to admit the police report containing McBride's statement under MRE 804(b)(7). Moreover, defendant argues that exclusion of the statement deprived him of his constitutional right to present a defense.

We review for an abuse of discretion the trial court's decision to admit or exclude evidence. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). If the "inquiry requires interpretation of the Michigan Rules of Evidence, an issue of law is presented, which this Court reviews de novo." *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). "An error in the admission or exclusion of evidence will not warrant reversal unless refusal to do so appears inconsistent with substantial justice or affects a substantial right of the opposing party." *Id.*

Generally, we review de novo constitutional questions. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001). However, because defendant did not raise the issue of his right to present a defense before the trial court, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). There are three requirements to meet the plain error standard: the existence of an error, the error must be clear or obvious, and it must have affected the outcome of lower court proceedings. *Id.*

Defendant does not dispute that the police report detailing McBride's statement constitutes hearsay. Hearsay is inadmissible at trial unless a specific exception allows its introduction. MRE 802; *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). Rather, defendant contends that the statement is admissible under MRE 804(b)(7), which provides a catch-all exception to the hearsay rule for an unavailable declarant, and allows for the admission of:

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

When offering evidence under MRE 804(b)(7), "[t]he first and most important requirement is that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exceptions." *People v Katt*, 468 Mich 272, 290; 662 NW2d 12 (2003). A court "should consider the 'totality of the circumstances' surrounding each statement to determine whether equivalent guarantees of trustworthiness exist." *Id.* at 291. "There is no complete list of factors that establish whether a statement has equivalent guarantees of trustworthiness," *id.* at 292, but relevant factors include:

> (1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he spoke, (7) to whom the statements were made, and (8) the time frame within which the statements were made. [*People v Geno*, 261 Mich App 624, 634; 683 NW2d 687 (2004) (citation omitted).]

Without a showing of a particularized guarantee of trustworthiness, a statement will be deemed presumptively unreliable and therefore inadmissible. *People v Smith*, 243 Mich App 657, 688; 625 NW2d 46 (2000). Additionally, as our Supreme Court has noted, "the inquiry into trustworthiness aligns with the inquiry demanded by the Confrontation Clause, which requires courts to examine the totality of the circumstances that surround the making of the statement for particularized guarantees of trustworthiness." *Katt*, 468 Mich at 290-291 (quotation omitted).

On appeal, the parties dispute only whether the statement contained sufficient circumstantial guarantees of trustworthiness. We conclude that the trial court did not abuse its discretion by concluding that the proffered statement was not sufficiently trustworthy. The record demonstrates that the statement was not spontaneous or made shortly after the shooting, but, rather, it was made during a police interview conducted about nine months after the shooting occurred. Further, the statement was internally inconsistent. For example, McBride said he went to the party with his two friends, "Keify" and "Tut" who he had known for "years"; however, he was not then able to provide officers with their real names. McBride also changed his story with regard to whether he ever saw a weapon. Further, McBride stated he was not sure if Wilson's vehicle was in an accident or not, and stated that "maybe" there was an accident and then changed his mind and said that the vehicle was just stuck in traffic. Moreover, McBride's statement is contradicted by physical evidence, most importantly, the fact that the vehicle was in fact in an accident. After Wilson was shot, his foot pressed down on the accelerator and his vehicle crashed into another vehicle in the parking lot. Wilson's foot remained pressed on the accelerator after the crash, causing the tires on his vehicle to smoke as they continued to spin. The parking lot was reportedly filled with smoke.

The record does not contain evidence in regard to whether McBride had a motive to fabricate his story, the reason he was unavailable to testify, the voluntariness of his statements, or his personal knowledge. The fact that the statements were made to police weighs in favor of their admissibility. However, the factors calling the trustworthiness of the statement into doubt far outweigh this factor. Accordingly, we conclude that the trial court did not abuse its discretion by denying defendant's request to admit the police report containing the hearsay statements.

With regard to defendant's constitutional claim, "[t]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (internal quotes and citations omitted). "The right to present a defense is a fundamental element of due process." *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006), quoting *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). However, the right is not absolute and defendant must still comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Yost*, 278 Mich App at 379 (quotations omitted).

First, we note that defendant has failed to cite authority to support his claim that the exclusion of the evidence violated his right to present a defense. Accordingly, we need not review this claim of error because it is abandoned. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004) ("The failure to brief the merits of an allegation of error constitutes an abandonment of the issue."). Nevertheless, we conclude that defendant's claim is without merit. Here, the trial court did not deny defendant of his right to present a defense; rather, it simply required defendant to comply with the requirements of MRE 804(b)(7) by ensuring that the proffered statement was trustworthy before it would permit the admission of McBride's statement. As discussed *supra*, the trial court correctly determined that the statement did not meet the standard for admissibility as required by MRE 804(b)(7). Accordingly, defendant was not denied his constitutional right to present a defense by the trial court's refusal to admit the police report because the report was inadmissible; thus, the evidence did not comply with established rules of evidence designed to assure fairness and reliability. *Yost*, 278 Mich App at 379.

Next, defendant argues that the trial court erred by denying his request to instruct the jury on the lesser included offense of voluntary manslaughter.

We review de novo questions of law arising from jury instructions. *People v McMullan*, 284 Mich App 149, 152; 771 NW2d 810 (2009). If error is found, "[a] preserved, nonconstitutional error is not a ground for reversal, unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002) (quotations omitted); see also *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999).

"A necessarily lesser included offense is an offense whose elements are completely subsumed in the greater offense." *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003). Our Supreme Court has found that the elements of voluntary manslaughter are included in the elements of murder, including second-degree murder; therefore, voluntary manslaughter is a necessarily included offense in this case where defendant was charged with first-degree murder. *Id.* at 533, 541. Consequently, "when a defendant is charged with murder, the trial court must give an instruction on voluntary manslaughter if the instruction is 'supported by a rational view of the evidence.'" *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013), quoting *Mendoza*, 468 Mich at 541. See also *Cornell*, 466 Mich at 355-356 ("it is not error to omit an instruction on such lesser offenses, where the evidence tends to prove only the greater.")

Here, defendant only argues that a voluntary manslaughter instruction should have been given. The elements of voluntary manslaughter include, "defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People v Reese*, 491 Mich 127, 143, 815 NW2d 85 (2012). "[P]rovocation is not an element of voluntary manslaughter; rather, it is a circumstance that negates the presence of malice." *Mitchell*, 301 Mich App at 286. In *People v Tierney*, 266 Mich App 687, 714-715; 703 NW2d 204 (2005), this Court considered the elements of voluntary manslaughter and found that "[t]he degree of provocation required to mitigate a killing from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." (Quotation omitted). The *Tierney* panel held that "[i]n order for the provocation to be adequate[,] it must be that which would cause a reasonable person to lose control." *Id.* at 715 (citation and quotation marks omitted). Provocation that consists only of words generally does not constitute adequate provocation. *People v Pouncey*, 437 Mich 382, 391; 471 NW2d 346 (1991). Further, "[t]he word 'passion' in the context of voluntary manslaughter describes a state of mind incapable of cool reflection. A defendant acting out of a state of terror, for example, is considered to have acted in the 'heat of passion.'" *People v Townes*, 391 Mich 578, 589 n 3, 590; 218 NW2d 136 (1974). Our Supreme Court has found that if the defendant has a sufficient "cooling-off period," the defendant has not established the necessary "heat of passion." *Pouncy*, 473 Mich at 392 (30 seconds an adequate "cooling-off period).

In this case, the trial court determined that voluntary manslaughter was not a lesser included offense of first-degree murder under *Cornell*, 466 Mich at 363-364. However, in *Mendoza*, 468 Mich at 533, 540-541, our Supreme Court, quoting *Cornell*, 466 Mich at 356, found that voluntary manslaughter is a necessarily included offense of second-degree murder. Accordingly, we conclude that the trial court erred. Further, in light of its conclusion that voluntary manslaughter was not a lesser included offense of first-degree murder, the trial court did not perform the necessary analysis to determine whether the facts of this case support a voluntary manslaughter instruction. See *Mendoza*, 468 Mich at 541 ("Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." Nevertheless, "we will not reverse the trial court's decision where it reached the right result for a wrong reason." *People v Mayhew*, 236 Mich App 112, 118; 600 NW2d 370 (1999).

We conclude that in this case, regardless of the trial court's error, a rational view of the evidence of record does not support the giving of a voluntary manslaughter instruction. Here, nothing in the record suggested that defendant acted in the heat of passion. Under defendant's theory of the incident, he was walking with his cellular telephone in his hand across the parking lot talking to his wife when Wilson pulled into the parking lot and his SUV nearly hit defendant. Defendant testified that he threw up his hands and stepped back. Defendant testified that he then saw Wilson reach down into the SUV and pull out a gun, which caused defendant to turn around and run away. Defendant testified that he did not tell anyone that Wilson had a gun or report the incident to the police—even after the shooting—because he "didn't get harmed" and it did not make much of an impact on him. Thus, according to defendant, he took no part in the shooting. He testified that he did not have a gun and was not the shooter. Accordingly, because defendant claimed that he did not commit any kind of murder, a rational view of his testimony does not support that he acted in the heat of passion. See *Mendoza*, 468 Mich at 546-547 (involuntary

manslaughter instruction was not appropriate because, in part, it was contrary to the defendant's theory that he never had possession of the gun used in the murder).

Furthermore, recognizing that a defendant may present inconsistent theories, *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), the evidence apart from defendant's theory of innocence did not support the instruction. Defendant testified that Wilson reached down into the SUV and showed defendant a gun, but defendant very specifically testified that it did not have much of an impact on him. Thus, by defendant's own admission, the interaction with Wilson did not incite defendant to act with passion. Further, prosecution witnesses testified that defendant walked up to Wilson's SUV, spoke to Wilson, threw his hands in the air, and then walked behind the SUV. Once behind the SUV, defendant stood between two other cars, drew a weapon, and shot at the back of the SUV. Because defendant walked away from the incident and had a cooling-off period, a rational view of the evidence does not establish that defendant acted in the heat of passion. See *Pouncy*, 473 Mich at 392 (30 seconds an adequate "cooling-off period). No other evidence was presented at trial to support that the claimed event between Wilson and defendant incited defendant such that his emotions were aroused to a degree that the choice to refrain from crime became difficult. *Id.* at 389. Therefore, we conclude that a rational view of the evidence does not support a manslaughter instruction, and the trial court did not err by refusing to so instruct the jury.[1]

Finally, defendant argues that *Alleyne v United States*, ___US___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), which holds that judges may not find facts that increase the mandatory minimum sentence for a given offense, applies in this case because Michigan's "sentencing guidelines produce a mandatory sentencing range which is the equivalent of a mandatory minimum term." Accordingly, defendant maintains that he must be resentenced because under *Alleyne*, the trial court may not rely on any facts outside of those established by the jury verdict in order to score his offense variables, and in this case, the trial court found facts not established by the jury verdict to support the scoring of several offense variables. However, during oral

[1] We note that defendant argues that *People v Oster*, 97 Mich App 122, 128; 294 NW2d 253, (1980), and *People v Caldwell*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2013 (Docket No. 298791), should control the outcome of this case. However, we conclude that these two cases are not analogous to the facts of this case. In *Oster*, the Court found that a voluntary manslaughter instruction was appropriate where the victim, an uninvited party guest, provoked an argument with the defendant, punched the defendant, and threw the defendant on his back. *Id.* at 128. Here, defendant and Wilson had no physical contact, and after interacting with Wilson, defendant walked behind Wilson's vehicle, drew his weapon, and fired into the back of Wilson's SUV. Further, in *Caldwell*, the defendant's version of the incident was that he confronted the victim after his girlfriend identified the victim as the person who carjacked her five days earlier. *Caldwell*, unpub op at 3. The defendant testified that the victim became argumentative during the confrontation, and that the victim caused or allowed his dog to react threateningly or aggressively toward the defendant; thus the defendant claimed that he acted in self defense. *Id.* at 1, 3. In this case, unlike the facts of *Caldwell*, there is no evidence that defendant was or may have been incited to act out of passion.

argument defense counsel conceded that *People v Herron*, __ Mich App __; __ NW2d __ (issued December 12, 2013), is controlling and stated that the issue was merely presented for purposes of preservation in the event that our Supreme Court grants leave. *Herron* holds that Michigan's sentencing guidelines do not establish a mandatory minimum, and thus, judicial fact-finding when scoring the offense variables does not violate due process or the defendant's Sixth Amendment right to a jury trial. We agree that *Herron* is controlling, MCR 7.215(C)(2), and accordingly, defendant is not entitled to resentencing.[2]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause

[2] Although the parties acknowledged that *Herron* controls the outcome and did not argue that a conflict panel should be convened under MCR 7.215(J), we question whether *Herron* was correctly decided. In particular, *Herron* held that

> While judicial fact-finding in scoring the sentencing guidelines produces a recommended range for a minimum sentence of an indeterminate sentence, the maximum of which is set by law, *Drohan*, 475 Mich at 164, it does not establish a *mandatory minimum*; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process of the Sixth Amendment's right to a jury trial. [Emphasis in original.]

We disagree with the conclusion that Michigan's sentencing guidelines do not establish a mandatory minimum because MCL 769.34(2) provides that "the minimum sentence imposed by a court of this state . . . shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed." Thus, MCL 769.34(2) requires a trial court to sentence a defendant within the guidelines range, and accordingly, sets a mandatory minimum. Nevertheless, we decline to invoke a conflict panel under MCR 7.215(J) because this issue is of significant import and must ultimately be resolved by our Supreme Court.